IN THE
SUPREME COURT OF MISSOURI

No. SC85247

HEATHER BLAIR, a minor, by and through her Next Friend CARLA SNIDER,

Plaintiff/Appellant,

-vs-

PERRY COUNTY MUTUAL INSURANCE COMPANY
and
FMH MUTUAL INSURANCE COMPANY

Defendants/Respondents

SUBSTITUTE BRIEF OF RESPONDENTS

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Oral Argument Requested

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TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Respondents accept the jurisdictional statement of Appellant, with the exception of Appellant's statement that the Opinion of the Missouri Court of Appeals, Eastern District, directly conflicts with an opinion of this Court, which Respondents deny any conflict exists.

STATEMENT OF FACTS

Respondents generally agree with Appellant's Statement of Facts, however, there are additional facts that do need to be presented. Respondents will follow the format presented Appellant.

III. Notice, Nonpayment of Policy Premium, and the Injury of October 21, 1998.

Ralph Schamburg, an agent for Perry County Mutual Insurance Company, caused a Notice of Payment of Premium to be mailed to Aileen Fiedler on September 14, 1998, notifying Ms. Fiedler her premium was due on October 3, 1998 and if the premium was not paid on the due date, her policy of insurance would be void. (L.F. Vol I p. 5).

A copy of the notice that was sent to Ms. Fiedler was attached to Ralph Schamburg's Affidavit (LF Vol I p. 117).

The exact language contained in the notice sent to Ms. Fiedler on September

14, 1998 stated (in part):

"Keep this part for your records. Notice of Payment Due. Policy Void if Not Paid by Due Date" (LF Vol I. p. 117).

Aileen Fiedler, in her response to Interrogatories propounded to her in May, 2000, in the lawsuit brought by Appellant against Ms. Fiedler in the Circuit Court of Perry County, Missouri, stated in response to Appellant's question of whether Ms. Fiedler had insurance coverage on the date Appellant Heather Blair was injured: "(e) 04/03/94 effective date. Said coverage expired due to cancellation on 10/03/98." (LF Vol I p. 25).

The notice of September 14, 1998 sent by Perry County Mutual to Ms. Fiedler was sent to Ms. Fiedler's last known address , by U.S. mail, postage prepaid (LF Vol I p 115).

Ms. Fiedler in her deposition of August 3, 2000, (in the case of Blair v. Fiedler), did not know if she received the September 14, 1998 notice or not because Ms. Fiedler was moving her residence and must have missed the notice somewhere (LF Vol I p. 120-121).

Ms. Fiedler further stated she had made her last premium payment about three months prior to the lapse (LF Vol I p. 120).

Respondents' answer to Appellant's petition affirmatively stated the policy

of insurance issued to Aileen Fiedler was cancelled prior to the date Appellant was injured (LF Vol I p. 15, 19).

POINTS RELIED ON

I.

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS BECAUSE THE POLICY OF INSURANCE ISSUED TO AILEEN FIEDLER WAS PROPERLY CANCELLED EFFECTIVE OCTOBER 3, 1998, AS THE NOTICE SENT TO AILEEN FIEDLER BY RESPONDENTS ON SEPTEMBER 14, 1998 UNAMBIGUOUSLY AND UNEQUIVOCABLY INFORMED FIEDLER HER POLICY WOULD BE VOID IF THE POLICY WAS NOT PAID BY THE DUE DATE, SAID NOTICE BEING NOT LESS THAN 10 DAYS PRIOR TO THE EFFECTIVE DATE OF THE CANCELLATION AND NO COVERAGE EXISTED FOR AILEEN FIEDLER AND THE INJURIES SUSTAINED BY APPELLANT ON OCTOBER 21, 1998.

Hyten v. Cape Mutual Insurance Company, 663 S.W. 2d 430 (Mo. App. 1983)

Shelter Mutual Insurance Company v. Flint, 837 S.W. 2d 524 (Mo. App. 1992)

Klim v. Johnson, 16 Ill App. 2d 484, 148 N.E. 2d 828 (1st Dist. 1958)

Waynesville Security Bank v. Stuyvesant Insurance Company, 499 S.W. 2d 218 (Mo.

App. 1973)

II.

THE TRIAL COURT DID NOT ERR IN CONSIDERING EVIDENCE PROFFERED BY RESPONDENTS CONCERNING THE PROOF OF MAILING A PREMIUM NOTICE TO AILEEN FIEDLER AS RESPONDENTS' AFFIDAVIT BY RALPH SCHAMBURG AFFIRMATIVELY STATED THAT A NOTICE OF PREMIUM WAS MAILED IN THE UNITED STATES MAIL, POSTAGE PREPAID, TO AILEEN FIEDLER ON SEPTEMBER 14, 1998 AND THE AFFIDAVIT OF RALPH SCHAMBURG COMPLIED WITH RULE 74.04 (e) OF THE MISSOURI RULES OF CIVIL PROCEDURE.

Fitzpatrick v. Hoehne, 746 S.W. 2d 652 (Mo. App. 1988)

St. Charles County v. Dardenne Realty Company, 771 S.W. 2d 828

(Mo. banc 1989)

Larouche v. Webster, 175 F.R.D. 452 (S.D. NY 1996)

Boyd v. State Farm Insurance Company, 158 F.3d 326 (5th Cir. 1998)

Missouri Rule of Civil Procedure 74.04 (e)

Federal Rule of Civil Procedure 56(e)

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS BECAUSE THE POLICY OF INSURANCE ISSUED TO AILEEN FIEDLER WAS PROPERLY CANCELLED EFFECTIVE OCTOBER 3, 1998, AS THE NOTICE SENT TO AILEEN FIEDLER BY RESPONDENTS ON SEPTEMBER 14, 1998 UNAMBIGUOUSLY AND UNEQUIVOCABLY INFORMED FIEDLER HER POLICY WOULD BE VOID IF THE POLICY WAS NOT PAID BY THE DUE DATE, SAID NOTICE BEING NOT LESS THAN 10 DAYS PRIOR TO THE EFFECTIVE DATE OF THE CANCELLATION AND NO COVERAGE EXISTED FOR AILEEN FIEDLER AND THE INJURIES SUSTAINED BY APPELLANT ON OCTOBER 21, 1998.

Appellant argues that in order to effectively cancel the insurance policy issued to Ms. Fiedler for nonpayment of a premium, the sequencing of events that must take place for an effective cancellation must include, (a) the nonpayment of the premium, (b) issuance of written notice by the Respondent to Fiedler and (c)

the lapse of 10 days after the mailing of the notice. Appellant's argument that the policy requires this sequence of events to take place prior to an effective cancellation is erroneous.

First of all no where contained in the insurance policy issued to Aileen Fiedler did the requirement that the notice to be issued to Fiedler must follow the failure to pay the premium. The policy language under the amendatory indorsement states unequivocably that the Respondents may cancel the policy or any of its parts by mailing or delivering to the named insured a written notice before the cancellation is to take effect and the notice must be given not less than 10 days before the cancellation is to take effect.

Respondents' notice to Aileen Fiedler was sent on September 14, 1998 for a premium that was due on October 3, 1998 and that notice stated "Notice of payment due. Policy **void if not paid by due date"** (emphasis added). The word cancelled is not used, however, there is no uncertainty about the word void. Void means null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended. Blacks Law Dictionary, 5th Edition, also see Nelson v Marshall, 869 S.W. 2d 132, 134 (Mo. App. 1993). Cancellation, also defined by Blacks Law Dictionary, 5th Edition means "to destroy the force, effectiveness or validity of". Void and cancel have similar

meanings.

Cancellation, as used in the insurance law context means termination of a policy prior to the expiration of the policy period by act of one or all of the parties. Waynesville Security Bank v. Stuyvesant Insurance Company, 499 S.W. 2d 218, 220 (Mo. App. 1973).

Illinois has interpreted the act of cancellation to occur when the insurance company sends a written notice, in which it positively or affirmatively indicates to the insured that it is the intention of the company that the policy shall cease to be binding upon the expiration of a stipulated number of days from the time when the intention is made known to the insured. Klim v. Johnson, 16 Ill App. 2d 484, 148 N.E. 2d 828, 830 (1st Dist. 1958).

The Respondents by their notice of September 14, 1998 notified Aileen Fiedler that her premium was due October 3, 1998 and if her premium payment was not made by October 3, 1998 her policy would be void. There is no uncertainty as to the fact that the insurance company 10 days before October 3, 1998 gave Aileen Fiedler notification of what the policy required. The policy required a notice at least 10 days in advance that the policy would be cancelled and that the event of cancellation was a result of the nonpayment of the premium. All of the requirements set forth in the policy of insurance entered into between Respondent

and Aileen Fiedler were met. There was a positive, affirmative indication by Respondents to void Aileen Fiedler's policy on October 3, 1998, if she did not pay her premium by that date.

The policy of insurance between Aileen Fielder and Respondents is nothing more than a contract. Transport Indemnity Company v. Teter, 575 S.W. 780, 784 (Mo. App. 1978). One of the essential terms of the contract of insurance is the premium being paid by the insured as consideration for the insurer's assumption of the risk insured against. Chailland v. MFA Mutual, 375 S.W. 2d 78, 81 (Mo banc 1964).

In Hyten v. Cape Mutual Insurance Company, 663 S.W. 2d 430 (Mo. App. 1983), the Plaintiff purchased an insurance policy insuring a mobile home and contents for fire and other casualties. The premium was payable in two installments, one at the beginning of the policy period and the other approximately six months later. Beginning on the second anniversary of the policy, the defendant insurance company, approximately 30 days prior to the next premium due date, sent a notice to the plaintiffs that the next premium was due on March 11, 1981 and the notification contained a warning, similar to the warning in the case at bar, that failure to pay the premium on of before the due date shall suspend plaintiff's policy and the company will not be liable for any loss during the suspension. The

premium was not paid when due and the policy was suspended and during the period of suspension a loss occurred. In the Hyten case, the court of appeals upheld the grant of summary judgment to the defendant insurance company on the basis that the continued payment of premiums by an insured on or before the due date was required to continue the policy in force and the duty of the insurance company to pay benefits under the policy. Hyten, 663 S.W. 2d at page 431. The Hyten case further acknowledged that failure to pay the premium on the due date after notice had been given rendered the policy suspended and **VOID** (emphasis added) as to the interest of the insured until the payment of premium is made and that in no case would the insurance company be liable to the insured for any loss accruing during such suspension. Hyten v. Cape Mutual Insurance Company, 663 S.W. 2d at 431.

The facts in the case at bar are very similar to Hyten. More than ten days prior to the next premium due date, September 14, 1998, Respondents sent a notice to Aileen Fiedler informing her that if she didn't pay her premium by October 3, 1998 her policy would be void. It is undisputed that Aileen Fiedler did not pay the premium on October 3, 1998 and has never paid the premium. Accordingly, on October 3, 1998, prior to the loss occurring, Aileen Fiedler's policy of insurance lapsed, was void, was of no force and effect, and the trial court correctly ruled in

favor of the Respondents.

A notice provision similar to what Respondents sent to Aileen Fiedler also was upheld in the case of Shelter Mutual Insurance Company v. Flint, 837 S.W. 2d 524, (Mo. App. 1992). In the Flint case, Shelter sent a premium notice approximately 20 days prior to the premium due date. At the bottom of the premium notice in bold type was the wording "nonpayment Shelter Mutual Insurance Company and Shelter General Insurance Company Policies. No insurance is afforded by Shelter Mutual Insurance Company if payment of the premium is not received by the company by due date... there is no grace period for late payment of premium... ". The court of appeals said there was nothing misleading about the premium notice. It informed the insured that the premium is due and the consequences of not paying the same. Shelter Mutual Insurance Company v. Flint, 837 S.W. 2d at page 531. In the Flint case, coverage lapsed before the date of the accident for nonpayment of the premium and Shelter did not have an obligation to pay the loss to the Flints.

Once again, the ruling of the trial court granting summary judgment to the Respondents was not erroneous, as the premium notice was unequivocable and specifically notified Aileen Fiedler of the due date of the next premium and the consequences if the premium was not paid on the due date.

Aileen Fiedler, in her answer to interrogatories in May of 2000, affirmatively stated that her insurance coverage had expired due to cancellation on October 3, 1998. This was an unequivocable and unqualified statement. At the time of the interrogatory answers, Ms. Fiedler was represented by legal counsel.

Not until August of 2000, during the deposition of Aileen Fiedler did she qualify her statement of coverage expiring due to cancellation by indicating that she doesn't remember receiving the premium notice because she was moving. However, by affidavit of Ralph Schamburg, he affirmatively stated that the premium notice was sent to Aileen Fiedler on September 14, 1998, postage prepaid to her last known mailing address. A letter duly mailed is attended by the presumption of receipt by the addressee. Shelter Mutual Insurance Company v. Flint, 837 S.W. 2d 524, 528 (Mo. App. 1992). The letter is duly mailed when it is placed in an envelope with the correct address of the recipient, stamped with sufficient postage and deposited in the mail. Id at page 528. The affidavit of Ralph Schamburg recites the essential facts of mailing, the date of mailing, the payment of the postage and the address of Aileen Fiedler to be the last known address of Aileen Fiedler. The premium notice was sent to her by the records of Respondents and this does not create a fact situation for a jury to determine. Appellant does not raise any question about the mailing or the proper address of Aileen Fiedler where the notice

was sent on September 14, 1998.

Appellant has raised the issue of whether or not the termination was within the strict compliance of the cancellation provisions of the policy issued to Aileen Fiedler. Appellant cites several cases to support this proposition.

The first case cited by Appellant is Dyche v. Bostian, 229 S.W. 2d 225 (Mo. App. 1950). Dyche states the general proposition of law that if a policy contains a specific provision for cancellation by either party it is binding upon the parties and must be strictly complied with. However, Dyche deals with an ineffective attempt to cancel a workers' compensation policy because neither party mutually agreed to the cancellation. That case is not on point.

In the case of Safeco Insurance Company of America v. Stone and Sons, Inc., 822 S.W. 2d 565 (Mo. App. 1992), other than citing the general proposition of strict compliance with the notice provision, is not on point because the factual situation in Stone and Sons, Inc. was that the notice of cancellation was sent to the wrong person, therefore the cancellation notice was not effective under those circumstances.

In Gambill v. Cedar Fork Mutual Aid Society, 967 S.W. 2d 310 (Mo. App. 1998), the general proposition of strict compliance with the notice provisions for cancellation is not disputed, however, the factual situation in Gambill is not similar

to the case at bar as the issue of not receiving the premium notice is not really disputed by Aileen Fiedler. In Gambill there was a genuine dispute of the receipt of the notice from the insurance company.

MFA Mutual Insurance Company v. Southwest Baptist College, Inc., 381 S.W. 2d 797 (Mo 1964) is totally inapposite to the case at bar as the Southwest Baptist case dealt with acquiring additional insurance on some property at Southwest Baptist College and there was no provision in the policy that would cancel a previous policy if additional insurance was procured. Southwest Baptist provides no legal precedent for reversing the trial court's determination.

Finally, Nichols v. Mamma Stuffeati's, 965 S.W. 2d 171 (Mo. App. 1997) does not provide any additional support to Appellant's claim. In Mamma Stuffeati's , there was insufficient evidence offered by the insurer concerning when the cancellation occurred because the insurance company had destroyed its records pertaining to the policy issued to the insured and the insurer failed to produce sufficient evidence showing termination of the policy. There was no affirmative evidence showing cancellation being sent to the insured. In the case before this Court, no real dispute exists as to mailing of notice or non receipt of the notice by Aileen Fiedler. Accordingly, Mamma Stuffeati's is distinguishable from the facts of the case at bar and does not lend any aid to Appellant's position.

What is strikingly absent from any case cited by Appellant is a factual situation or statement of law that requires a notice of cancellation for nonpayment of premium to follow the failure to pay a premium by a certain due date. The contract language in Aileen Fiedler's policy does not require such process and the cases cited by Respondents provide ample legal support for the application of the procedure Respondents followed in notifying Aileen Fiedler her policy would be void if she failed to pay her premium by a certain date.

For the reasons set forth herein, this Court should affirm the trial court's grant of summary judgment to the Respondents.

ARGUMENT

II.

THE TRIAL COURT DID NOT ERR IN CONSIDERING EVIDENCE PROFFERED BY RESPONDENTS CONCERNING THE PROOF OF MAILING A PREMIUM NOTICE TO AILEEN FIEDLER AS RESPONDENTS' AFFIDAVIT BY RALPH SCHAMBURG AFFIRMATIVELY STATED THAT A NOTICE OF PREMIUM WAS MAILED IN THE UNITED STATES MAIL, POSTAGE PREPAID, TO AILEEN FIEDLER ON SEPTEMBER 14, 1998 AND THE AFFIDAVIT OF RALPH SCHAMBURG COMPLIED WITH RULE 74.04 (e) OF THE MISSOURI RULES OF CIVIL PROCEDURE.

Appellant claims that the trial court erred in considering the affidavit of Ralph Schamburg because some of the documents attached to the affidavit were not "sworn or certified copies of all papers or parts thereof" and that the Respondents failed to provide proof to the trial court that the Respondents mailed the premium notice to Aileen Fiedler.

The issue relative to the mailing of the notice to Aileen Fiedler was addressed in Respondents' Brief, Argument Section I, and the statement of law as it pertains to the notice of mailing will not be repeated here, however, the principles are incorporated into this section of Respondents' Brief. It is very clear, however, that Ralph Schamburg's affidavit concerning the notice of mailing is sufficient evidence of mailing. First the affidavit was made on personal knowledge that the notice of premium payment was mailed to Aileen Fiedler, by depositing same in the United States mail, postage prepaid and sent to the last known address provided by Aileen Fiedler. It was also stated in the affidavit that the mailing took place on September 14, 1998 with a copy of the type of notice sent to Aileen Fiedler. The information contained in Ralph Schamburg's affidavit, together with the fact that the premium notice was sent to Aileen Fiedler on September 14, 1998 comports in form and substance to the affidavit approved in the Flint case, 837 S.W. 2d at pages 527 - 528. The fact that Aileen Fiedler does not remember receiving the premium notice because

she was moving at the time does not mitigate against summary judgment for Respondents. As indicated in Flint, 837 S.W. 2d at page 528, "the response of the Flints, simply that they did not receive the policy, to this evidence of mailing by Shelter on summary judgment did not dispel the presumption of receipt that attends that proof."

Appellant's authority of Gambill v. Cedar Fork Mutual Aid Society, 967 S.W. 2d 310(Mo. App. 1998) is misplaced in determining whether there is a genuine issue of material fact concerning whether the notice of cancellation was mailed or not. Evidence concerning the mailing in the Gambill case was insufficient because the person who testified concerning the mailing could not identify the date the notice was mailed nor provide a copy of the notice. Further the insured testified as to nonreceipt of the notice. On the basis of these facts, the court in Gambill said a material issue of fact existed. This is not the case in the present matter before this Court. Ralph Schamburg unequivocably stated that the notice was mailed to Aileen Fiedler on September 14, 1998 and attached a copy of the type of notice sent to her with the language that would have been on the notice. Gambill does not provide support for Appellant's position concerning whether a material issue of fact exists as to the mailing of the premium notice to Aileen Fiedler. Additionally, Aileen Fiedler does not unequivocably state she did not receive the notice, rather she says she doesn't

remember the notice being sent to her because she was in the process of moving. However, by her interrogatory answers, approximately three months prior to her deposition being taken, she acknowledged that the policy was cancelled effective October 3, 1998. This admission predisposes that Ms. Fiedler knew of the premium notice, but failed to pay the premium when due.

Appellant does not overcome the presumption that a letter duly mailed is received by the addressee. Shelter Mutual Insurance v. Flint, 837 S.W. 2d at page 528.

The issue of whether or not Aileen Fiedler received the notice in view of the equivocation of Aileen Fiedler as to her moving and not remembering the receipt of the premium notice and the affirmative statement of Ralph Schamburg that the notice was mailed on September 14, 1998, does not create a jury question precluding summary judgment.

The second issue by Appellant deals with the appropriateness of the affidavit of Ralph Schamburg. Ralph Schamburg's affidavit (LF Vol. I p. 147-148) is an affidavit under oath and sworn to by Ralph Schamburg and acknowledged by a notary public. Additionally, the affidavit states that information contained in it is from the personal knowledge of Ralph Schamburg. The document in question was a similar copy to the notice that was sent to Aileen Fiedler along with the computer print out of

the policies that were either paid or cancelled. Appellant argues that this is an improper affidavit. An affidavit pursuant to Missouri Rule of Civil Procedure 74.04 must be made upon personal knowledge of the affiant and must be verified under oath in order for the affidavit to be proper. Fitzpatrick v. Hoehne, 746 S.W. 2d 652, 654-655 (Mo. App. 1988). Both of the conditions exist in Ralph Schamburg's affidavit. The affidavit has attached to it specific documents which Schamburg has specifically identified as having personal knowledge of. A summary judgment affidavit must be made upon personal knowledge, must set forth facts, which would be admissible into evidence and show affirmatively that the affiant is competent to testify on matters stated therein. St. Charles County v. Dardeene Realty Company, 771 S.W. 2d 828, 830 (Mo. banc 1989). Ralph Schamburg was an agent for Perry County Mutual Insurance Company, could testify about the various matters set forth in his affidavit, and no issue has been made about Ralph Schamburg not being competent to testify as to the matters asserted in his affidavit.

The documents attached to the affidavit were authenticated by Ralph Schamburg and attached to the affidavit and accordingly would comply with Rule 74.04 (e) of the Missouri Rules of Civil Procedure.

Federal Rule of Civil Procedure 56 (e) is almost identical in language to Rule 74.04 (e). Research does not disclose Missouri courts ever ruling on the standard of

review of either granting or denying a motion to strike a summary judgment affidavit. However, the federal courts have utilized a clearly erroneous or contrary to the law standard. Larousche v. Webster, 175 F.R.D. 452, 454 (S.D.N.Y. 1996); Boyd v. State Farm Insurance Company, 158 F. 3d 326, 331 (5th Cir. 1998). Respondents urge this Court to adopt a manifestly erroneous or clearly erroneous standard in reviewing the court's denial of striking part of Ralph Schamburg's affidavit. Based on this standard, the trial court did not err in not striking certain portions of Ralph Schamburg's affidavit because it obviously complied with the essential elements of Rule 74.04 (e).

For the foregoing reasons, the trial court did not err in granting summary judgment to the Respondents and further did not err in not striking any portion of Ralph Schamburg's affidavit and no material issues of fact exists concerning the notice of premium being sent to Aileen Fiedler on September 14, 1998.

CONCLUSION

Based on the legal arguments presented herein, it is respectfully submitted the judgment of the trial court granting the Respondents summary judgment be affirmed in all respects.

Respectfully Submitted,

SPRADLING, SPRADLING & SOUTHARD

By _____

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CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on the word processing program by which it was prepared, contains 4406 words, exclusive of cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing the Substitute Brief of the Respondent in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-

free.

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing Substitute Brief of Respondents were served upon the attorney of record, Matthew Devoti, Casey & Meyerkord, One Metropolitan Square, Suite 3190, St. Louis, Missouri 63102, attorney for Appellant, by enclosing the same in an envelope, with postage prepaid, and by depositing said envelope in the United States Mails at Cape Girardeau, Missouri, on the _____ day of _____, 2003.

_____

Subscribed and sworn to before me this _____ day of _____,

2003.

SEAL

_____

Notary Public